No. 91-1324

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONSOL PENNSYLVANIA COAL COMPANY, et al.,

Petitioners,

vs.

JAMES E. HUGHES, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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Petitioners' misrepresent the facts and the record, as they have consistently done in this case. There has not been a significant change in controlling law that would justify Petitioners' tardy attempt to raise a due process argument. Judge Teitelbaum's charge, which is quoted at page 10 of Respondents' Brief in Opposition, shows that Pennsylvania law and the Restatement of Torts 2nd, Sec. 908 et seq., require that punitive damages have a direct relationship to compensatory damages.

Haslip, decided by this court, requires no more than what the restatement does and that which was charged to the first jury as to punitive damages.

There is no uncertainty as to this punitive damage award under Pennsylvania law. It directly reflects the long standing Pennsylvania law. Constitutional punitive damage law requires no more.

The memorandum Petitioners noted at page 3 of their Reply Brief did not deal with the punitive damage issue, it dealt with the RICO statute. The Petitioners are well aware that under the federal rules of civil procedure briefs are not matters of record. They are also aware that it is error to misrepresent the record. The Petitioners April 10, 1987 memorandum noted in their reply brief at page 3 is quoted in its pertinent parts as follows:

> "There was a Miscarriage of Justice and
> *Denial of Due Process Requiring a New Trial.*
>
> These are cases in which an immensely useful project for the mining of great tonnages of coal is to be severely penalized for frauds that are phantom. Despite the clear power vested in the Monongahela to condemn plaintiffs' properties, fraud has been found on the ground that Mr. Boggs said that "you can forget Consol" and spoke other words to the same effect. *That the RICO statute can be applied to this trivial departure from perfect truth adds an eloquent voice to the chorus of criticism that has been massed against the statute. See generally Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* (March 28, 1985).

• • • •

Finally, the result in these cases raises a serious question under the Fifth Amendment, for "due process guarantees a *comprehending* factfinder." *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1084 n. 14 (3d Cir. 1980) (emphasis theirs). When a jury is unable to perform the task "with a reasonable understanding of the evidence and the legal rules," due process is denied. Id. at 1084 (barring jury trial in complex antitrust action). Here, it was an idle hope that, after a parade of witnesses and more than 200 exhibits in a seven-week trial of eight consolidated cases, *the jury would comprehend and apply to the evidence, without elaborate explanation, such elusive statutory language as, "conduct [an] enterprise's affairs through a pattern of racketeering activity...." 18 U.S.C. Sec. 1962(c).* The truth is that there are lawyers, law professors, and judges who cannot agree on these terms. As a distinguished appellate judge has said, "even a cursory review of the case law indicates that there is simply no consensus on what RICO requires." Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 (2d Cir. 1984) (Oakes, C.J.), *rev'd on other grounds*, 105 S. Ct. 3275 (1985). On a motion for new trial the "judge's duty is essentially to see that there is no miscarriage of justice." 6A *Moore* 59-149. Here the circumstances brought about such a miscarriage, and the verdict must be set aside."

(Emphasis Added)

x x x

Finally, the Petitioners again make illogical leaps to say that because Judge Teitelbaum thought the compensatory award was excessive that he said the same as to the punitive damage award. No such statement was ever made nor does the record ever reflect this. The Petitioners, throughout the course of this litigation, have had little regard for the truth.

Their Petition should be denied.

Respectfully submitted,

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